Revised 30 December 2014.

Constitution on Ice

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Drawing on various materials that have not been presented in English before, this chapter reviews the making of Iceland's post-crash, partly crowd-sourced constitution bill and the unprecedented attempt by Parliament subsequently to kill the bill. Following a brief historical introduction,[1] the chapter describes step by step how the bill was prepared and then put together, how it was received, and how and why Parliament is trying to prevent the bill from being adopted. The chapter addresses various criticisms leveled against the bill along the way. It needs to be emphasized up front that these criticisms, whether well founded or not, are irrelevant because Parliament held a national referendum on 20 October 2012 in which the bill and its key individual provisions were accepted by an overwhelming majority of the voters. A democratic nation cannot under any circumstances permit the outcome of national elections, let alone a constitutional referendum, to be fixed *ex post*, but this is what Parliament is at present trying to do in an open affront to democracy.

Historical Background

A key promise given by the post-crash government in early 2009 concerned the constitution which, drawn up in haste at the time of Iceland's full separation from Denmark in 1944, Parliament had promised to revise ever since without being able or willing to keep its promise, partly because it was not impelled by crisis to do so.[2] In his New Year's address to the nation in 1949, Iceland's first president, Sveinn Björnsson (1949), reminded the political

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[1] For further background, see Thorvaldur Gylfason, "Constitution on Ice." CESifo Working Paper 5056 (Munich: University of Munich, 2014).

[2] Jon Elster, "Forces and Mechanisms in the Constitution-Making Process." *Duke Law Journal* 45 (1995).

parties of their failure to fix the constitution, saying that "... we still have a mended garment, originally made for another country, with other concerns, a hundred years ago." The post-crash government concluded that since the politicians had failed to revise the constitution for almost 70 years, it was time to bestow the task on a specially elected Constitutional Assembly—that is, to have a new constitution drafted by the people rather than by Parliament. This promise constituted an admission of failure as well as an undeclared acknowledgement that a Constitutional Assembly elected in accordance with the principle of "one person, one vote" was better suited to the task than MPs elected on the basis of current electoral laws, granting rural voters on average twice as much say in parliamentary elections as voters in the Reykjavík area where two thirds of the population reside.

Emboldened by the first scientific public opinion poll conducted in Iceland, Governor Sveinn Björnsson, soon to become president, managed to have two key novelties inserted into the provisional constitution of 1944 that was otherwise kept essentially unchanged from 1874, or 1849. The novelties were that the President of the Republic (a) would be elected by the people, not by Parliament as the parties wanted (this gave Iceland one of the first popularly elected presidents in Europe)[3] and (b) could veto legislation from Parliament and refer it to a national referendum. This provision lay dormant for 60 years until it was activated for the first time in 2004 to block the government's plan to regulate media ownership in a way that would have forced Iceland's largest daily newspaper and the sole television station competing with state television to close down.[4] Second, as even Iceland´s own fairly uneventful and yet acrimonious constitutional history shows, constitutions are by nature political declarations, outlining the rights and obligations of citizens, including the powers of the organized few versus the unorganized masses (Lasalle 1862). Accordingly, constitutions are conducive to disagreements about individual provisions. Rights protected in constitutions entail obligations that may understandably meet resistance. Those who, like President Ólafur R. Grímsson (2013), claim that constitutional amendments must be approved by consensus are fundamentally at odds with the historical evidence, but their position serves the interests of those opposed to constitutional reform.

[3] Precedents include France in 1848 and Germany in 1919.

[4] A former politician, the president who activated the veto clause in 2004 had earlier as professor of political science taught that, according to the 1944 constitution, the president was only a figurehead without any substantive powers. Many politicians had forgot or pretended to forget that they had lost a key battle with the governor in 1944 (Svanur Kristjánsson, "Frá nýsköpun lýðræðis til óhefts flokkavalds: Fjórir forsetar Íslands 1944–1996 " [From the Creation of Democracy to Unfettered Political Party Power: Four Presidents of Iceland, 1944–1996], *Skírnir*, Spring (2014)).

The Making of Iceland's Post-crash Constitution

The constitutional revision process launched by the government of the Social Democratic Alliance and Left-Green Movement in 2009 was, in many ways, exemplary.[5] To start with, the government decided to task directly elected representatives of the people with drafting a new post-crash constitution or revising the one from 1944. To launch the process, Parliament appointed a seven-member Constitutional Committee consisting mainly of academic experts from a range of fields (law, literature, natural science, and social science). The composition of the committee reflected Parliament's unspoken understanding that the constitution is not exclusively, and not even principally, a legal document, but primarily a social compact, a political declaration. Legal expertise, even if it can be helpful, is not really essential to writing a constitution because the constitution supersedes ordinary legislation by virtue of the fact that the people are superior to Parliament. Even so, lawyers are needed to help draft ordinary legislation to insure, *inter alia*, its consistency with the constitution adopted by the people.

The role of the Constitutional Committee was threefold: (a) to organize a National Assembly (or Forum) where citizens selected at random from the national register would, under expert supervision, convene for a day to define and discuss their views on the constitution´s contents; (b) prepare a nationwide election of 25 representatives to a Constitutional Assembly, whose task would be to draft a new constitution reflecting as far as possible the views of the National Assembly; and (c) prepare the ground for the Constitutional Assembly by offering analysis of the 1944 constitution and gathering and making available in print as well as on the internet information about foreign constitutions and other material.

At first, there was reasonable harmony in Parliament, its members either encouraged or humbled by the results of the 2009 election that produced Iceland's first majority government without both the Independence Party and the Progressive Party. Government and opposition collaborated on to how to proceed. One key promise given by the Progressive Party before the 2009 election was a new constitution to be drafted by directly elected representatives of the people. To its credit, the Independence Party, also in opposition after the 2009 election, went along, proposing or at least co-sponsoring the idea of convening a National Assembly.[6] A

[5] Zachary Elkins, Tom Ginsburg, and James Melton, "A Review of Iceland's Draft Constitution," 14 October, 2012, accessed August 17, 2014, http://sans.is/wp-content/uploads/2012/10/CCP-Iceland-Report.pdf; Hélène Landemore, "Inclusive Constitution-Making: The Icelandic Experiment," *Journal of Political Philosophy* (2014), accessed August 17, 2014, https://www.academia.edu/5289629/Inclusive_Constitution-Making_the_Icelandic_Experiment; A. C. M. Meuwese, "Popular Constitution-making. The Case of Iceland," in *The Social and Political Foundations of Constitutions*, edited by Denis Galligan and Mila Versteeg (New York: Cambridge University Press, 2013).

[6] Law No. 90, 25 June 2010, accessed December 29, 2014, http://www.althingi.is/altext/138/s/1397.html

similar national assembly had been elected and convened in Reykjavík in 1851 during the wave of revolutions then sweeping Europe only to be unilaterally dissolved in mid-stream by the representative of the Danish King.

An experimental, privately organized national assembly had been held in Iceland in 2009,[7] shortly after the crash, with foreign expert input based on the principle of collective intelligence, and this became the prototype of the National Assembly of 2010 to which 950 citizens from 18 to 91 years of age were selected at random from the national population register subject to side conditions to insure gender balance, fair representation of different regions, and such. This means—and this point is the key to the democratic backbone of the project—that every Icelander 18 years or older had an equal chance of being invited to a seat in the National Assembly.

With the help of about 200 assistants, the National Assembly met for a day in early November 2010, at the end of which it issued a set of conclusions, stating that a new constitution was called for and that it needed to contain certain provisions on national ownership of natural resources and equal voting rights and to foster accountability, decentralization of power, environmental protection, transparency, and so on. All this material was made accessible to the public on the Constitutional Committee's website.[8] The resolution accorded well with the results of public opinion polls that had consistently reported for many years that a majority of the voters do want national ownership of natural resources, equal voting rights, etc.[9] There were no inconsistencies or surprises. This is why criticisms of the way the National Assembly was organized and the short time it was given are beside the point in the Icelandic context and also why the Assembly did so much to enhance the democratic legitimacy of the process.

Constitutional Assembly Elected

The next step was to elect the 25 representatives of the Constitutional Council in late November 2010 as laid down by the law that stipulated, for example, that MPs were not eligible to run.[10] By that time, however, two years after the crash, reform fatigue had set in, partly perhaps because the economic rescue operation sponsored by the IMF already appeared

[7] Mauraþúfan, "Þjóðfundur: Stefnumót við framtíðina" [National Assembly: Meeting with the Future], accessed September 23, 2014, http://www.thjodfundur2009.is/fraedsluefni/
[8] See "The Main Conclusions from the National Forum 2010," accessed December 29, 2014, http://www.thjodfundur2010.is/english/
[9] Thorvaldur Gylfason, "Clean Slate" (Reykjavík: Gutti, 2012), 112-116.
[10] Law No. 90, 25 June 2010, see footnote 6.

likely to succeed against serious odds, emboldening those politicians and parties held primarily responsible for the crash in the SIC report[11] to blame the crash on foreign conspirators[12] and to oppose the government's rescue effort, including the constitutional project. Some opposition politicians spoke of the "so called crash" as if nothing had happened.[13] Even so, the months leading up to the November 2010 Constitutional Assembly election went by without fanfare. Until the deadline for putting one's name forward as a candidate, it was impossible to know whether the election would prove to be a fiasco for lack of interest or not. But after the deadline passed about a month before the election, it became known that 522 individuals had stepped forward, each supported by between 30 and 50 signatures.

Thus, there were at least 15,660—and possibly as many as 26,100—signatures behind the 522 candidates, between seven percent and eleven percent of eligible voters. On the other hand, political parties and interest groups showed little interest in the election, partly perhaps to underline that this was to be the people's constitution as opposed to the political elite's constitution, and they made no visible effort to encourage people to vote. The opposition parties had already turned their back on the project. Only the Independence Party sent lukewarm letters to their members with two slightly different lists of approved candidates. Even the governing coalition parties that had launched the project appeared listless. With one significant exception, the newspaper *DV*, the media showed little interest in presenting the views of the 522 candidates to the voters except each was given three to four minutes on public radio. There was no campaign to speak of, no competition for votes among the candidates, just chat among friends on Facebook and such. Even so, 37% of the electorate turned out to vote.

The 25 candidates who got the most votes came from different walks of life. Perhaps the most striking feature of the group is that five of them were professors (economics, mathematics, medicine, political science, and theology) and three others were junior academics (mathematics, philosophy, and political science), a much higher proportion of PhDs—six out of 25—than in Parliament. This, plus the uniformly high level of education and varied experience of the elected representatives, helped ensure access to outside expertise.

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[11] Rannsóknarnefnd Alþingis [Special Investigation Commission of the Icelandic parliament], *Aðdragandi og orsakir falls íslensku bankanna 2008 og tengdir atburðir* [The causes and effects of the fall of the Icelandic banks and related events] (Reykjavik, Rannsóknanefnd Alþingis, 2010).
[12] Styrmir Gunnarsson, *Umsátrið* [*The Siege*] (Reykjavík: Veröld, 2009).
[13] Former Prime Minister Geir Haarde told *The Guardian* on October 6, 2013 that "There were older people who didn't even realize there had been a crisis."

After the election results were announced, the leaders of the opposition in Parliament went on the attack against the government, calling the election a failure on account of the 37% turnout which, nonetheless, is comparable with earlier national referenda without direct political party involvement in Iceland[14] or Switzerland, for that matter.

When confronted by a group of 25 directly elected representatives to the Constitutional Assembly, some politicians had reason to become uneasy. It was, for them, one thing to have under pressure from protesters in the streets felt obliged to prepare for a directly elected constituent assembly and quite another 18 months later to face a group of 25 elected members clearly beyond the control of the political parties used to behaving like a state within the state. Before the election, the answers given by the 23 of the 25 elected representatives to questions concerning the constitution posed by *DV*, were remarkably homogeneous. They showed that a vast majority of the representatives agreed with the conclusions of the National Assembly. For example, 19 out of 23 representatives favored changing the constitution; 22 favored national ownership of natural resources; 22 favored equal voting rights; and 21 favored more frequent national referenda.[15] Further, the answers given by a large majority of all 522 candidates showed a similar pattern, suggesting that a random draw of representatives from the list of 522 candidates or from the population at large would also most likely have produced a constitutional bill containing these key provisions. Unmistakably, there was a broad and clear popular consensus in favor of substantive constitutional reform that would, among other things, aim to (a) sever what many saw as the corrupt relationship between the political class and parts of the business community, particularly the vessel owners who had grown used to regarding Iceland's common-property fish resources as their private possession and (b) reduce the power of political party leaders to surround themselves in Parliament with provincial MPs with few votes behind them. The question can be raised whether this would have been possible had there been no crash. The 1944 constitution was not directly responsible for the crash, true, but it was clearly not able to prevent the crash either. The weak separation of powers between the three branches of government had led to executive overreach that produced, among other things, a poorly implemented privatization of the banks 1998–2003 through which they were sold at modest prices to well-connected individuals, paving their way to the cliff in 2008 (Gylfason 2013). In retrospect, it appears unlikely that the privatization of the banks as it was carried out would have been accepted in a national

[14] Gylfason, "From Collapse to Constitution: The Case of Iceland."
[15] Gylfason, "From Collapse to Constitution: The Case of Iceland."

referendum. Unsurprisingly, therefore, many Icelanders, including the new majority in Parliament, thought it reasonable to take a close look at the constitution after the crash.

Enter the Supreme Court

Three technical complaints about the vote count, the shape of the voting booths and such were filed immediately after the Constitutional Assembly election by individuals with connections to the Independence Party. On the basis of these complaints, six Supreme Court justices out of nine—five of them Independence Party appointees—issued an unprecedented administrative decision to annul the election. Of the six judges who annulled the election, four had, in one way or another, openly declared their opposition to national ownership of natural resources, known to have the support of 24 of the 25 elected representatives.[16]

Never before had a national election in a democracy been invalidated *ex post*. Further, there was no basis in law for the judges to make this decision because the law permits such a decision to be made only if an elected representative can be shown to have been ineligible to run or if fraudulent behavior can be shown to have influenced the election outcome, neither of which was claimed to have been the case. As a voter, one of the lawyers elected to the Assembly, Mr. Gísli Tryggvason, appealed to the Supreme Court to reconsider its decision or, at least, to permit a recount to address "significant deficiencies" alleged by the Court decision, but his appeal was dismissed by the Court.[17]

Axelsson[18] concludes his scathing analysis of the Supreme Court decision thus: "The only real and only significant deficiency in the election was that the Supreme Court spoiled it by a Decision which is demonstrably based on false reasoning and dubious sources of law."[19]

Parliament reacted to the Supreme Court's decision by offering the 25 elected Constitutional Assembly representatives appointment to a Constitutional Council. The opponents of constitutional reform were jubilant, reveling in the alleged lack of legitimacy of the Council and calling it an "irrelevant conference." Among other things, the 25 elected members were accused of dishonoring the 1944 constitution by accepting the Parliament's

[16] The details are provided in Thorvaldur Gylfason, „Constitution on Ice," 2014.
[17] Gísli Tryggvason, "Beiðni um endurupptöku ákvörðunar Hæstaréttar vegna kosningar til stjórnlagaþings" [Appeal for reconsideration of Supreme Court decision concerning election to Constitutional Assembly], 8 February 2011, accessed September 25, 2014, http://www.mbl.is/media/97/2597.pdf.
[18] Reynir Axelsson, "Comments on the Decision of the Supreme Court to Invalidate the Election to the Constitutional Assembly," accessed August 17, 2014, http://stjornarskrarfelagid.is/wp-content/uploads/2011/07/Article_by_Reynir_Axelsson.pdf.
[19] The Organization of Disabled in Iceland made en equivalent technical complaint about the 2012 presidential election, but the complaint was dismissed by the Supreme Court on the grounds that the alleged irregularities could not have affected the outcome of the election.

appointment.[20] None of us took such charges seriously, nor did any of us, apart from Mr. Tryggvason's appeal, bother to consider mounting a legal challenge to the Supreme Court decision which Parliament declared binding. We had been summoned by the people and Parliament to draft a post-crash constitution, and this is what we set out to do.

We first held a few informal meetings to prepare a set of operating rules as allowed by the law on the council. In preparation for my contribution to our joint work, I used my time to consult with colleagues at home and abroad, including one of the authors of the South African constitution from 1994-96 and other constitutional experts abroad as well as a number of local academics, lawyers, and others. Armed also with an excellent 700-page report from the Constitutional Committee plus other material, we came well prepared to our first formal meeting at the beginning of April 2011. After dividing the group of representatives into three subcommittees (A, B, and C), each charged with preparing initial drafts of about one third of the bill, one of the first decisions we needed to make was whether to start our work with a clean slate or let it suffice to amend individual provisions of the 1944 constitution. Quickly, it became clear that there was a broad consensus in favor of drafting a new constitution *ab initio*, even if the old constitution would naturally serve as a point of departure. This consensus appeared to result from the widely held view that the financial collapse called for a general overhaul of the constitution rather than marginal amendments. Another early decision concerned the extent to which our work would be carried out in full view of the public. It was decided that transparency through crowd sourcing should be attempted, a decision that perhaps came especially easily to the council members from academia where peer review is standard operating procedure. Thus, all General Assembly meetings were simulcast on the internet and subsequently posted on the council website whereas subcommittee meetings were held behind closed doors except when the subcommittees invited the members of other subcommittees and expert witnesses to visit on occasion. Little by little, the transcripts of all General Assembly meetings as well as the minutes of all meetings were posted on the council website. As the work progressed, it became clear that transparency through crowd sourcing was a good thing, because of the impressive quality and seriousness of the input received from members of the public who accepted the council's invitation to review and react to our written text week by week, but also because it made it unnecessary to extend invitations to representatives of interest organizations—artists, farmers, fishermen, pensioners, teachers, and so on. This was in the spirit of the opening salvo of the preamble of the bill: "We, the

[20] One elected representative declined to accept parliamentary appointment, and was replaced by the candidate next in line, a lawyer.

people of Iceland, wish to create a just society with equal opportunities for everyone."[21] This marked a major departure from the *modus operandi* of Parliament where it is common practice for strong interest organizations—e.g., vessel owners—to be invited to singlehandedly draft laws that concern them. Citizens from all walks of life generously offered their help: artists, farmers, and so on. Few academics did, however, and even fewer lawyers—perhaps because they viewed the Constitutional Council as intruders on their traditional turf.[22]

Virtually without exception, the Constitutional Council went about its business in harmony, an easy accomplishment perhaps in view of the broad consensus on the main issues. Naturally, though, there were some disagreements that needed to be addressed. For example, in view of the need for the new constitution to be approved by two successive parliaments in keeping with the 1944 constitution, some members thought it advisable to try to anticipate the will of Parliament by avoiding formulations considered likely to meet with its disapproval. Others thought it more important to stay true to the consensus reflected the conclusions of the National Assembly in 2010, arguing that only thus would a new constitution win approval in a national referendum which Parliament could not permit itself to disregard. For another example, some members wanted fairly radical change through a direct strengthening of the role of the President, direct national election of the Prime Minister, and so on. Others thought it enough to erect checks and balances between the three branches of government within the existing structure of government proscribed by the 1944 constitution, pointing out that the National Assembly had not asked for a strengthened role of the President. As a third example, some representatives felt that specific provisions if such could be devised were needed as precautions against another financial crash, while others thought that general provisions to strengthen checks and balances would suffice.[23] Some of the issues arising were settled by voting in subcommittees or in the General Assembly, which had the last word, while others were settled by compromise and consensus. For example, there was no need to take a vote on the natural resource clause in the A-subcommittee charged with drafting that provision because consensus prevailed in full agreement with the National Assembly. On occasion, the compromises reached required hard work as well as gentle diplomacy.

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[21] A literal translation of the original would replace "with equal opportunities for everyone" by "where everyone has a seat at the same table."

[22] In a newspaper interview after the referendum in 2012, a political science professor who had kept silent throughout the process called the council "completely illegitimate," adding that "a certain elite" (presumably including himself) should rewrite the constitution. Among the 25 Constitutional Council representatives, there were two political scientists one of whom was shortly afterward promoted to a professorship.

[23] Gylfason, "From Collapse to Constitution: The Case of Iceland."

The debates in the General Assembly and, for the most part in the subcommittees as well, were marked by calm, courtesy, and respect in visible contrast to Parliament. Otherwise, the work of the council could hardly have been completed in the four months assigned to the task by Parliament, least of all with a unanimous acceptance of the bill in the end by 25 votes to zero, no abstentions, an impressive political feat by any standard. The substance of the bill and its main provisions is reviewed in Gylfason (2013). Perhaps the main point here is that, even if council members considered themselves bound only by their conscience, they produced a bill that was in nearly perfect harmony with the conclusions of the National Assembly. The sole substantive difference is that while the National Assembly called for a reduction in the number of MPs, the Constitutional Council decided to keep their number unchanged at 63 so as not to signal an apparent internal inconsistency in a bill aiming to strengthen the legislative and judicial branches of government vis-à-vis the executive branch.[24]

As the work of the Constitutional Council progressed, it became apparent to several council members, especially to those with good contacts in Parliament, that parliamentary support for a new constitution was waning. When the bill was delivered to the Speaker of Parliament at a formal ceremony 29 July 2011, many of us were struck by the Speaker's visible lack of enthusiasm. Parliament declined to have the bill translated into English to facilitate foreign reaction to the bill, so that an official translation had to be privately financed by the Constitutional Society, an NGO.[25] Upon receiving the bill, Parliament sent it on to its Constitutional and Supervisory Committee which took several months to read and discuss the bill. In March 2012, nearly eight months after delivery, the former council members were summoned on short notice to a four-day special meeting to respond to several written queries by the Constitutional and Supervisory Committee on behalf of Parliament. Most but not quite all (21 of 25) former council members were able to attend that special meeting. As before, the council's answers to the Parliament's questions were unanimous. Perhaps the most significant query had to do with the natural resource clause stipulating, among other things, that "On the basis of law, government authorities may grant permits for the use or utilization of resources or other limited public goods against full consideration and for a reasonable period of time."

[24] This decision signals the council's easy attitude toward Parliament. Had the council wanted to make it more difficult in the eyes of the public for MPs to oppose the bill, it could have decided on a reduced number of seats in Parliament.

[25] Parliament also refused to sponsor an English translation of the SIC report (2010), making it necessary for foreign victims of the failed banks to finance such translations. Only a small fraction of the SIC report is available in English on the Parliament's website.

Parliament asked if the formulation "full consideration" could be replaced by "fair consideration." The council members' answer was a polite but resolute No, for two reasons. First, the replacement of "full" by "fair" might be interpreted as a constitutionally protected discount from full price to vessel owners which was not intended. Second, because the article on the right of ownership, unchanged from 1944, stipulates "full compensation" for confiscation of property, internal consistency requires full price in both clauses so as not to introduce discrimination among different types of ownership. Another question from Parliament led to a rewording of the electoral clause stipulating 'one person, one vote' that reduced the number of words in the provision by a third without affecting its substance, a welcome change. In a few other cases, the former council members responded to the Constitutional and Supervisory Committee's queries by suggesting alternative wording for clarification. The committee, or rather its majority of six of nine members, had declared that only changes in wording could be made, but no changes of substance.

National Referendum

Time passed. The government intended to hold a referendum on the bill at the time of the presidential election in June 2012 to encourage voter turnout, but the minority in Parliament, increasingly vociferous in its opposition to the bill, used filibuster to block this plan. Instead, the referendum was held on 20 October 2012. I asked the chairperson of the Constitutional and Supervisory Committee if the governing parties holding the referendum would explain the bill to the electorate before the referendum. The answer was "No." "Who then?" I asked. "You," was the answer, by which, I presumed, was meant the former Constitutional Council members whose legal mandate had expired in July 2011.

This is why the Alliance for a New Constitution (SaNS) was founded, an advocacy group whose aim was, and remains, to secure the adoption of the constitutional bill.[26] The Alliance had no financial resources apart from a small amount supplied by the Movement, the smallest opposition party in Parliament, and the Constitutional Society. The government declined to provide financial support to the effort to promote the bill as did both governing parties, the Social Democratic Alliance and the Left-Green Movement. SaNS was on its own; without it, the bill was an orphan. Even so, assisted by the Movement and its successor, Dawn, some meetings were held around the country to provide a modicum of visibility. A number of articles explaining the bill were published.

[26] The establishment of SaNS was necessary because the articles of the Constitutional Society prescribed that society's neutrality concerning the content of the constitution. The two merged in 2014.

As had been the case before the Constitutional Assembly election, even the political parties who had laid the bill before the voters were mostly absent from the scene before the referendum. Nonetheless, 49% of eligible voters turned out and 67% of them said Yes to the first question: "Do you want the proposals of the Constitutional Council to form the basis of a legislative bill for a new Constitution?" The formulation of this question could be seen to hold open the possibility that Parliament might turn against its original intention by trying to build something completely different on the basis of the bill. Ingenuously, however, Parliament had put five auxiliary questions on the ballot, including one on national ownership of natural resources (83% said Yes), another on equal voting rights, "one person, one vote" (67% said Yes), and yet another on more frequent use of national referenda (73% said Yes).[27] Thus, the majority in Parliament, including the Movement, could argue that not only does an overwhelming majority of the voters support the bill, but they also accept its key individual provisions. After the referendum, which they chose to refer to as an opinion poll because of its nonbinding nature, members of the opposition claimed that the absentees would have voted against the bill.

After the referendum, the Constitutional and Supervisory Committee asked a team of local lawyers, led by an official at the Prime Minister's office, to go over the bill once more to suggest improved wording if needed from a legal and technical point of view, again with clear instructions to the effect that no changes in substance would be allowed. Landemore (2014, 22-23) gives two examples of substantive changes for the worse suggested by the lawyers beyond their mandate. Here is a third example. The lawyers suggested a redrafting of the natural resource provision that fundamentally changed its meaning—in favor of the vessel owners. To its credit, the Constitutional and Supervisory Committee restored the original formulation that had been proposed by the Constitutional Council and presented to the public before the referendum. The story does not end here, however, because at a later stage the Constitutional and Supervisory Committee changed the natural resource clause by replacing the words "full consideration" by "normal consideration."

At the eleventh hour, in a surprise move, the Constitutional and Supervisory Committee asked the Venice Commission (VC) to review the bill, a proposal that members of the

[27] These numbers understate the level of support for the bill because many voters said Yes to the first question without voting on the remaining questions. Specifically, twice or more than twice as many passed on questions 2-6 as on question 1. This may be understood to impart a negative bias to the vote tally on questions 2-6 because if you vote for the bill as a whole you are likely to approve of at least some of its main provisions listed in questions 2-6 even if you do not say so on your ballot. For more on the results of the referendum, see Gylfason (2012b) and Helgason (2013).

Constitutional Council had made to Parliament more than a year earlier without success.[28] Members of the VC visited Iceland in January 2013, and delivered a month later a provisional report (Venice Commission 2013) [29] the main points of which the Constitutional and Supervisory Committee found it easy to incorporate into the final version of the bill. In places, it must be said, the VC showed a lack of familiarity with Iceland's situation and history. In particular, the VC's thoughts on the nationally elected President and his or her constitutional authority to refer legislation from Parliament to a national referendum were arguably unhelpful but harmless. Some of the VC's more useful comments concerned changes of wording that the Constitutional and Supervisory Committee had introduced into the bill, changes that were easily reversible, as well as new formulations here and there that were easy to accept. The most important substantive comment offered by the VC concerned the provisions on Parliament, provisions that neither MPs nor other observers had reacted against during the 18 months that the bill had been under scrutiny in Parliament and that Parliament, accordingly, had not put on the ballot in the 2012 referendum. In particular, the VC speculated that the bill perhaps went too far in strengthening Parliament vis-à-vis the executive branch, a point that the Constitutional and Supervisory Committee promptly rejected. Most importantly, however, the VC expressed its agreement with the key provisions of the bill on equal voting rights, personal elections to Parliament (as an alternative to party slates), direct democracy, freedom of information, and national ownership of natural resources. It took the Constitutional and Supervisory Committee only a short while to adjust the bill to the VC's comments.

Parliament's Turn

As the parliamentary election of April 2013 drew closer, less and less time was left for Parliament to pass the amended bill in accordance with the results of the referendum the year before. To encourage MPs, members of the Constitutional Society opened a website inviting MPs to declare whether they favored passing the bill before Parliament would adjourn. Gradually, and sometimes grudgingly, MPs submitted these declarations of support one after another until there was a majority of 32 votes in favor of passing the bill, in full view of the

[28] In a comic turn of events, Parliament asked the Constitutional Society for permission to use the latter's privately financed English translation of the bill. The permission was gladly granted.
[29] European Commission for Democracy through Law (Venice Commission), *Opinion on the draft new constitution. Council of Europe,* 11 March, 2013, CDL-AD(2013)010, accessed August 17, 2014, http://www.althingi.is/pdf/venice.coe.pdf

public. It seemed clear that not all of the remaining 31 MPs would vote against the bill. For comparison, the vote on holding the October 2012 referendum had been 35 in favor and 15 against with 13 abstentions.[30] While MPs might have rejected the bill in a secret ballot, the point here is that in Parliament there is no such thing as a secret ballot. When the new leaders of the governing parties (their older predecessors had stepped aside ahead of the approaching parliamentary election) presented a motion in Parliament aimed at defusing the constitutional debate, an MP for the Movement, Margrét Tryggvadóttir, presented an amendment to their proposal, an amendment comprising the constitutional bill *in toto* that the Speaker of Parliament, in keeping with universal procedural rules, had to bring to a vote first. The proposed amendment was a last-minute attempt to bring the bill to a vote, a bill openly if grudgingly supported by a majority of MPs. It was long past midnight, the last day of Parliament before recess. The Speaker, in violation of parliamentary procedure, did not bring the amendment—that is, the bill—to a vote. As a result, Parliament adjourned without voting on the bill that two thirds of the voters had accepted the year before. The outgoing Prime Minister, Jóhanna Sigurðardóttir, whose Social Democratic Alliance would a month later suffer the worst defeat in the history of parliamentary elections in Iceland, said: "The past few weeks were the saddest period of my 35 years in Parliament."[31]

Why did the people not take to the streets banging their pots and pans in protest against these events? A likely explanation is that a parliamentary election was only a month away and the opposition parties managed to steer the campaign toward short-term economic issues, promising instant debt relief to distressed households to escape punishment for having derailed the constitutional bill.

What Went Wrong?

Why did the bill fail to win acceptance in Parliament? As I see it, this outcome—which, for reasons laid out in what follows, I still view only as a temporary setback—had nothing to do with the alleged flaws of the bill. Rather, this occurred because the bill was designed to decentralize authority through redistribution of power from the political class to the people in accordance with clear instructions from the National Assembly of 2010 and because MPs

[30]The rural bias against the bill in Parliament can be discerned from the fact that MPs from the two urban (i.e., Reykjavík) electoral districts delivered 14 Yes votes against 6 No votes and 2 abstentions whereas MPs from the four rural districts delivered 21 Yes votes against 9 No votes and 11 abstentions.

[31] Reported on Icelandic State Radio, ruv.is. "Daprasta tímabillið á mínum þingferli" [Saddest period of my parliamentary career], 28 March, 2013, accessed 12, September, 2014. http://www.ruv.is/frett/%E2%80%9Edaprasta-timabilid-a-minum-thingferli%E2%80%9C.

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were in a position, granted them by the 1944 constitution, to block the bill. The fact that the referendum was advisory as opposed to legally binding is immaterial by virtue of the fact that the people are superior to Parliament.[32] The sole significant failure of the process was that the Speaker of Parliament could not be held accountable to have a vote on the bill. In an open vote, MPs would probably not have dared kill the bill against the clear will of the people as expressed in the 2012 referendum. Had Parliament taken a vote as it should have and, especially, had a second referendum been held at the time of the 2013 parliamentary election,[33] a new Parliament in 2013, however composed, would hardly have dared block the bill. To repeat, the process did not fail. A vocal minority in Parliament used filibuster with unprecedented determination and the majority shied away from responding with the 'nuclear option' of breaking the filibuster, fearing the consequences of such an extraordinary response.

Does the Bill Go Too Far?

The constitutional referendum of 2012 was arguably the most important and most democratic election in the history of the nation. This was the first time the voters were invited to a referendum to express their views on natural resource management, equal voting rights, and a few other key issues on a level playing field—one person, one vote—without interference from political parties. When the political parties began to comprehend the likely consequences of the constitutional reform process they had set in motion they turned against themselves. They believe that it amounts to political suicide to rise against the vessel owners.[34]

There were other, less prominent provisions in the bill intended to protect and promote human rights, thus imposing obligations on others. The environmental protection clauses would restrain the freedom of polluters to continue spoiling nature as before. The freedom of information clauses would restrict the freedom of those used to operating with impunity under a veil of secrecy, and so on. Yet, no one stepped forward to declare opposition to these clauses just as hardly anyone openly declared opposition even to the clauses on equal voting rights and national ownership of natural resources apart from the afore-mentioned botched attempt by the government's lawyers to pull the teeth out of the natural resource provision. This was understandable because the Constitutional Council's careful wording of the natural resource clause was consistent with and borrowed some of its language from official policy

[32] The 1944 constitution does not permit legally binding referenda, but the constitutional bill does. This particular provision of the bill was approved by 73% of the voters in the 2012 referendum (Gylfason 2012b).
[33] By law, Parliament needed to decide three months in advance to hold a second referendum on the bill coinciding with the parliamentary election in April 2013, and let the deadline pass.
[34] Gunnarsson *Umsátrið* [*The Siege*], 206.

declarations of all the political parties—declarations that they, it now appeared, intended to remain empty words. This is why criticism of the bill that surfaced after the national referendum did not focus on any of the above-mentioned issues but on something completely different—that is, on issues that Parliament, correctly, had seen no reason to put before the voters in the 2012 referendum.

What Happened Next

Opponents of the bill behaved as if they hoped the 2012 referendum would sink the bill. Otherwise they would have expressed their opposition to the bill before the referendum and warned the voters against accepting it. Three members of the seven-member Constitutional Committee that had in unison prepared the ground for the Constitutional Council now broke rank, raising individual objections to aspects of the bill—aspects that, based on careful analysis and debate on record,[35] the Constitutional Council had settled and the voters had accepted. Two of the former Constitutional Committee members even published an alternative bill—their personal constitution as it were—leaving out both national ownership of natural resources and equal voting rights as if no referendum had taken place. Having supplied more elected representatives to the Constitutional Council than any other single workplace, the University of Iceland or rather some of its units suddenly held a series of conferences at which mostly self-selected opponents of the bill, including the three minority members of the Constitutional Committee, aired their criticisms with increased fervor. As a rule, former members of the Constitutional Council were not invited to speak at these conferences[36] but some of them tried from their seats in the audience afterward and on blogs to correct some of the falsehoods propagated by several speakers.

Professors were invited to give testimony to parliamentary committees. At one such parliamentary committee meeting two economics professors testified that the adoption of the bill, especially the natural resource provision, would be ruinous to the point of triggering a mass exodus from the country. No minutes were kept at these parliamentary committee meetings, a revelation *per se*; however, a member of the committee in question, Thráinn Bertelsson, has given a description of the two professors' testimony, corroborated by a third witness at the meeting in question.[37] It needs to be added that many other academics not

[35] The minutes of Constitutional Council deliberations are available only in Icelandic.
[36] An exception to the rule is the conference at which several of the chapters in this volume were presented (not including this chapter, however).
[37] Gylfason (2014b). Not long afterward, the two professors in question were appointed the Independence Party chairman and Finance Minister's chief economic advisors.

directly involved in the process supported the bill at the drafting stage and afterward, both as (mostly unofficial) advisors to (members of) the Constitutional Council and as external observers.

Even if the criticisms leveled at the bill are not really worth discussing because they missed the boat, I will do so below, briefly. If you are an architect, you do not submit your designs after the submission deadline has passed. You respect the rules, and await the next competition. This common rule of courtesy the opponents of constitutional reform in Iceland proved unwilling to respect. To repeat, the criticisms of the constitutional bill are irrelevant because the bill was accepted by the people in a national referendum called by Parliament and, as if that were not enough, the bill accords minutely—with a single significant exception described before, in Parliament's favor as it happens—with the will of the nation as expressed by the National Assembly of 2010. Not a shred of evidence has been presented to show that any provision of the bill contradicts the conclusions of the National Assembly of 2010. The sole significant source of opposition to the bill springs from the political class and the special interests it represents, the usual suspects described by Elster (2015) as an *engrenage* of "cheap access to natural resources, a skewed electoral system, unsound banking practices, and corrupt politicians." The criticism has been political through and through, not legal, even if some lawyers have tried to dress it up in terms of legal jargon.

Some Criticisms

Let me review a few of the criticisms directed against the bill and describe why I disagree with them. A member of the Constitutional and Supervisory Committee complained that the bill included a provision on the appointment of judges, an issue that 23 representatives when asked had told the newspaper *DV* before the Constitutional Assembly election needed to be addressed in a new constitution. The Constitutional and Supervisory Committee member's complaint was that a new law had already been passed in the spirit of the constitutional provision proposed. The Council was, of course, aware of the new law, and inserted the provision into the bill simply to prevent the politicians from reverting to their old habits by retracting their recent reform of judicial appointments.

Some observers have remarked that the Constitutional Council lacked legal expertise. This complaint is misplaced. First, as stated earlier, a constitution is not a legal document but a political declaration of principle: In practice, a constitution can say whatever its framers want it to say. Second, there were four lawyers among the elected representatives on the council, and still more on its staff and among its advisors, including the lawyers on the Constitutional

Committee. Third, Eiríkur Tómasson, a respected law professor, now Supreme Court justice, acted as the Council's official legal advisor during the last few weeks of our work. I consulted with several other law professors and judges throughout the process as I am sure several of my council colleagues did as well. Constitution makers do not need to be experts in law or anything else for that matter just as MPs do not need to be experts. The key is to have democratically elected, competent, and well-intentioned representatives with good access to experts as well as to other citizens as needed. This the Council had, and this is an important reason why the Council succeeded and the bill was accepted by the voters.

Some have complained about the bill being drafted by a group most of whose members reside in the Reykjavík area. This concern is not, however, born out by the results of the 2012 referendum. All six questions except the one on church and state were answered in accordance with the bill in all six constituencies, with only two exceptions: The two rural northern constituencies (northwest and northeast) came out against "one person, one vote." The other two rural constituencies—against their own interests, one might think—came out in favor of "one person, one vote" as did the two urban ones.[38] Accordingly, not too much should be made of the conflict between the rural voters and the rest in this case. In fact, most of the council members residing in the Reykjavík area had strong roots in other parts of the country. Once again, the bill is fully consistent with the resolution of the National Assembly where all regions had fair representation.

The single most often heard criticism of the bill is that the "academic community" turned against it.[39] This is, of course, irrelevant and also false for the simple reason that in a pluralistic, democratic society there is no such thing as an 'academic community' as far as politics is concerned. Like other professions, academics can naturally disagree on politics.

Conclusion

As Elster (2015) points out, "an ordinary legislature should not serve as a constituent assembly or as a ratifying body. In either capacity, there is risk that it might act in a self-serving manner ..."[40]

This problem is at the heart of Iceland's predicament at present, making it even relevant to consider extra-constitutional means of respecting the popular will as expressed in the 2012 referendum rather than caving in to politicians keen to thwart the will of the people to protect

[38] Helgason, "Niðurstöður þjóðaratkvæðagreiðslu 20. október 2012 (leiðrétt)."
[39] Grímsson, "Nýársávarp."
[40] Jon Elster, "Icelandic Constitution-making in Comparative Perspective."

their own interests and those of their principals. The situation is quite serious. The next parliamentary election, to be held no later than 2017, will be held according to election laws that 67% of the voters rejected in the 2012 referendum by declaring their support for "one person, one vote."[41] This prospect would have been averted had Parliament abided by the will of the people before and after the 2013 parliamentary election.

The conduct of Parliament is seen by many as a direct affront to democracy in Iceland. Events like some of those described in this chapter—six Supreme Court judges annulling a national election on flimsy if not illegal grounds, Parliament openly disrespecting the overwhelming result of a constitutional referendum—are unprecedented. The constitution remains on ice, held hostage by a new parliamentary majority of the Independence Party and the Progressive Party, in government together again since mid-2013. Parliament set up a new Constitutional Committee, modeled on the many such committees that failed to produce a new constitution in the past and headed by a resolute opponent of constitutional reform who suddenly, a year later, at age 83, stepped aside on the grounds that he was too busy with other things.[42] The committee purports to view the constitution bill as one among several "options" as if no referendum had taken place.

These events need to be viewed in context. Parliament's failure thus far to respect the outcome of the 2012 referendum stands in the way of a democratic resolution to several current controversies, not least concerning the government's pending plan to grant vessel owners exclusive rights to the fishing grounds for 20-25 years. This plan would have no chance of being adopted were the new constitution already in place for then 10% of the electorate could demand a referendum where the plan would surely be defeated in view of the overwhelming public support for national ownership of natural resources expressed in the 2012 referendum. Hence the emphasis of the constitutional bill on checks and balances intended to reduce the risk of continued executive overreach by strengthening Parliament and the courts through the way MPs and judges are selected as well as through the right of the electorate to take certain issues out of the hands of the politicians.

[41] Further, 78% of the voters said Yes to permitting personal elections to Parliament to a greater degree than at present and 73% said Yes to including provisions enabling a specific proportion of the electorate to call for a national referendum on a specific matter (Gylfason 2012).
[42] His place was promptly taken by the lawyer from the Prime Minister's office as previously mentioned.

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